MUTHUSAMY v. ANG NAM CHEOW

[P.C. (Lord Wilberforce, Lord Russell of Killowen & Lord Keith of Kinkel) May 8 & June 25, 1979]

[Privy Council Appeal No. 3 of 1978]

Practice and Procedure — Appeal — Question of facts — Court of Appeal should not have disagreed with findings of fact of trial judge.

In this case there was an accident between a motor-cycle ridden by the appellant and a motor-car driven by the respondent at the junction of Upper Changi Road and Tangmere Road, Singapore. The learned trial judge rejected the evidence of the defendant and held that he was wholly to blame for the accident. The Court of Appeal reversed the conclusion and held that the plaintiff was wholly to blame. The plaintiff appealed.

Held, the Court of Appeal had not in express terms reminded itself of the practical fetters upon its ability to disagree with the findings of the trial judge. In effect it had said that despite the conduct of the defendant after the accident and despite the bad impression on his veracity made on the judge in the witness box, the judge should have accepted his evidence and rejected that of the plaintiff. This the Court of Appeal was not entitled to do.

Cases referred to:-

(1) *San Seong Choy & Ors.* v. *Yuson Bien* [1962] M.L.J. 427.

(2) *Chow Yee Wah* v. *Choo Ah Pat* [1978] 2 M.L.J. 41.

HIGH COURT.

Pala Krishnan for the plaintiff.

Chim How Yan for the defendants.

Cur. Adv. Vult.

D'Cotta J.: The plaintiff's claim is for damages for personal injuries and consequential loss suffered by him and caused by the negligence of the 1st defendant as servant or agent of the 2nd defendant in the driving of motor car registration No. E2002E.

At the conclusion of the hearing, judgment was entered for the plaintiff for the sum of $70,000 which was the agreed quantum of damages, and costs against the 1st defendant Ang Nam Cheow. The plaintiff's claim against the 2nd defendant was dismissed with costs. The 1st defendant now appeals against the said judgment.

The facts are as follows:— On May 22, 1973 at about 10.50 p.m. the plaintiff was riding his motor cycle along Tangmere Road which is on the left of Upper Changi Road as one approaches Changi Point and about 600 to 800 yards away from Changi Point. On arriving at the junction of Tangmere Road and Upper Changi Road there is a stop sign as a result of which the plaintiff stopped his motor cycle. He looked right and then left and again looked right and when he looked right a second time, about 120 yards away he saw lights on what appeared to be a vehicle. There is a street light in Tangmere Road just before you come to the stop sign. The plaintiff proceeded beyond the stop sign and crossed Upper Changi Road. When he was 3 or 4 feet beyond the centre broken white line having crossed the said white line and had just straightened his motor cycle, he observed the vehicle whose lights he had seen when he had stopped earlier at the "stop sign" had come very close to him and was travelling at full speed; on seeing this vehicle coming close to him, the plaintiff who was travelling in second gear at the time swerved left to avoid the collision but was unsuccessful. From his evidence the plaintiff did not appear to have a good concept of distances, nevertheless under cross-examination he said he crossed from Tangmere Road into Upper Changi Road because the lights of the vehicle which he had seen was some distance away and he could safely go on to the other side of the road.

The defendant in evidence said that on the day and time in question he was returning to his home at Changi Point after attending a Chinese wedding dinner. He was travelling 30-40 m.p.h. and was about 1 or 2 feet from the left edge of the road. When he was about 60 feet from Tangmere Road he began to slow down as he knew the area well. When he reached a spot about 20 feet from Tangmere Road, he noticed a motor cycle shooting out at great speed from Tangmere Road. He swerved left and applied his brakes but was too late to avoid the collision. When the defendant hit the motor cyclist, the latter was on his side of the road — 8 or 9 feet from the left edge of the road. The defendant's speed at that time was slightly more than 30 m.p.h. He pulled up immediately after the accident and moved to the left edge of the road. He was about to alight and render first aid when he noticed a lot of people coming out and shouting as a result of which he drove away.

The plaintiff and the defendant both gave different versions of the accident. There is authority however in cases where the witnesses on each side tell conflicting stories, that the photographs, plans and measurements of the scene and the nature of the damage to each vehicle must provide the most reliable guide by which such evidence can be tested — see *San Seong Choy & Ors.* v. *Yuson Bien.*[1]

Let us now test the evidence. The defendant said when he was driving along Upper Changi Road, the plaintiff on his motor cycle shot out from Tangmere Road which is an off road or minor road off Upper Changi Road at great speed. If he is to be believed, then the plaintiff is wholly to blame for the accident; if such is the case, it is indeed strange that the defendant did not go straight to a Police Station at the first available opportunity and make a report. Again if he is to be believed, the defendant drove off after the accident because, as he said, he heard a commotion and a crowd approaching. The defendant stays at Changi Point. There is a police station at Changi Point; why did he not drive straight to the police station and ask them to render first aid to the victim and at the same time lodge his report. Again there was nothing to prevent him from going to the police the first thing the next morning and making his report. He, however, did nothing of the sort: he only informed DW1 from whom he borrowed the car that he had met with an accident and that the car had crashed into a tree. The defendant went to Sepoy Lines Police Station on May 25, 1973 i.e. three days after the accident, at the request of DW1 the owner of the car which the plaintiff was driving. DW1 made this request after his car had been seized by the police from a garage where it was being repaired. But for the fact that the police had seized the car and DW1 had asked the defendant to go to the police station, it is safe to infer that the defendant had no intention what-

ever of reporting this accident. This indeed is not the conduct and behaviour of a person who had been involved in an accident through no fault of his own. On the contrary, his conduct is such that it can only be attributed to one who knows full well that the accident occurred as a result of his negligence.

Even when the defendant went to the police station on May 25 to make his report — AB2 — considering the fact that he was not injured and that he made the report 3 days after the accident, he should have been able to give a very good description as to how the accident occurred. Although he alleged in his evidence that the accident was due to the fault of the plaintiff shooting out of Tangmere Road at great speed, his report strangely enough is completely silent as to this. To say the least his report throws no light whatever as to how the accident occurred.

Again under cross-examination, the defendant said that he saw about 10 persons coming out from a canteen and shouting. When asked what the shouts were about, he said they were shouts of "assault" "assault". On being pressed on this point, he admitted that he never heard the words "assault" "assault" but that he did hear a commotion. I did not believe the defendant at all. I watched him very closely when he was giving evidence and I also watched his demeanour and I was convinced that he was not a witness of truth: I rejected his evidence.

Exhibit AB8 which is a photograph of the damaged motor cycle clearly shows that there was no damage to the front portion of the motor cycle and even the front of the petrol tank: only the rear of the petrol tank was damaged which would clearly indicate that it was not a head-on collision. In fact the damage to the motor cycle would tend to indicate that the plaintiff had swerved left to avoid the accident as he alleged and that he was hit a glancing blow by the defendant's car. Exhibit AB10 which is a photograph of the car clearly shows that there was only damage to the right mudguard and the right head lamp. The front portion of the car was not damaged at all and this would once again support the plaintiff's story that he had swerved to avoid the accident and as he swerved, the right side of the defendant's car hit the rear portion of his motor cycle. Again, if the defendant as he alleged hit the plaintiff when the latter was about 8-9 feet from the left edge of the road having shot out of Tangmere Road, his car would have hit the motor cycle broad side, in which event the entire front portion of the car or a better part of it at least would have been damaged, and the motor cycle would have shown more damage. The result of such an impact would be that the motor cycle would have fallen on the left side of the road as one faces Changi Point and it would never have been where it was eventually found — on the spot marked an "X" on AB3 the sketch plan. Furthermore, the plaintiff marked with a double "XX" on AB3 the position of his motor cycle on the point of impact — from this point to where the motor cycle was found is a distance of 50-60 feet, and the only conclusion that can be arrived at when considering that the plaintiff's motor cycle was thrown backward this distance, is that the defendant must have been travelling at great speed.

The width of the road from A to B is 31 feet and 4 inches; half of this would be about 15 feet and 7 inches. If as the defendant says that he was travelling 1-2 feet from the edge of the road and allowing for the fact that his motor car is about 6-7 feet in breadth, he still had about 5 feet on his side of the road to manoeuvre in, such being the case there is no excuse whatever for him to cross 3-4 feet into the plaintiff's side of the road which would mean that he was about 18-19 feet from the left edge of the road bearing in mind that there was no evidence of any other vehicle or anybody else making use of the road at that time. The plaintiff's injuries were as follows: —

(1) close fracture of the right humerus associated with a right wrist drop;
(2) compound fracture of right tibia/fibula;
(3) close fracture shaft of right femur;
(4) extensive crush and degloving injury of the right foot.

It is pertinent to note that all the injuries suffered by the plaintiff were on the right side of his body. The nature of the injuries, the sketch plan, the photographs and the damage to the vehicles, leave little doubt that the plaintiff's version of the accident is consistent with how the accident occurred. I had no doubt whatever in my mind that the accident was caused by the negligence of the defendant in that he was driving very fast, failed to observe the plaintiff's presence on the road and as a result failed to take effective steps to avoid the accident. In my judgment he was solely to blame for the accident and I awarded the plaintiff the damages agreed upon and costs.

From the above judgment the first defendant appealed to the Court of Appeal (Wee Chong Jin C.J., Kulasekaram & Chua JJ.).

COURT OF APPEAL.

Chim How Yeun for the appellant.

Pala Krishnan for the respondent.

Chua J. (delivering the judgment of the Court): This appeal arises from a claim made by the respondent against the appellant for damages for personal injuries and consequential loss suffered by the respondent and caused by the negligence of the appellant arising out of a collision between motor car No. E 2002E driven by the appellant and motor cycle No. AN 3892L ridden by the respondent along Upper Changi Road on May 22, 1973.

The trial judge held that the appellant was solely to blame for the accident and gave judgment for the respondent in the agreed sum of $70,000 damages and costs.

The appellant now appeals against the said judgment.

The evidence of the respondent was shortly this. On May 22, 1973, at about 10.50 p.m. the respondent was riding his motor cycle along Tangmere Road which is on the left of Upper Changi Road as one approaches Changi Point and about 600 to 800 yards away from Changi Point. On arriving at the junction of Tangmere Road and Upper Changi Road he stopped his motor cycle at the stop sign there. He looked right and then left and again looked right and when

he looked right a second time he saw lights of a vehicle about 120 yards away. The respondent then said: —

"I proceeded on. I passed the stop sign came 3-4 feet on the main road. Just then a vehicle had come very close to me with the headlights fully on at a full speed: On seeing the vehicle very close to me I tried to swerve to my left to avoid a collision. I could not avoid the collision so the accident occurred."

The court then asked the respondent to indicate how far 120 yards would be and the respondent indicated a distance of fifty-nine feet. Then the court made this note:

"Witness now says he came on to the main road and was 3-4 feet away from the centre broken white line having crossed the centre broken white line."

It is to be noted that his first version was that the collision took place when he was three to four feet on the main road after passing the stop sign, that is, it took place on the appellant's side of the road.

The trial judge, however, made a finding that the collision took place when the respondent had crossed three or four feet beyond the centre broken white line and the respondent had just straightened his motor cycle.

The version of the accident given by the appellant was shortly this. That night he was returning to his home at Changi Point after attending a Chinese wedding dinner. He was travelling at 30-40 m.p.h. and was about one or two feet from the left edge of the road. When he was about sixty feet from Tangmere Road he began to slow down as he knew the area well. When he reached a spot twenty feet from Tangmere Road, he noticed a motor cycle shooting out at great speed from Tangmere Road. He swerved left and applied his brakes but was too late to avoid the collision. When he hit the motor cyclist the latter was on his side of the road — eight or nine feet from the left edge of the road — and his speed at that time was slightly more than 30 m.p.h. He pulled up immediately after the accident and moved to the left edge of the road. He was about to alight and render aid when he noticed a lot of people coming out and shouting as a result of which he drove away.

The trial judge was unduly influenced by the conduct of the appellant in not going to render assistance to the respondent and in not going straight to the police station at the first available opportunity and make a report. He concluded:

"This indeed is not the conduct and behaviour of a person who had been involved in an accident through no fault of his own. On the contrary, his conduct is such that it can only be attributed to one who knows full well that the accident occurred as a result of his negligence."

After examining the evidence given by the appellant, as regards the Police Report made by the appellant and his explanation as to why he did not render assistance, the trial judge said in his grounds of decision:

"I did not believe the defendant at all. I watched him very closely when he was giving evidence and I also noted his demeanour and I was convinced that he was not a witness of truth. I rejected his evidence."

We are of the view that the trial judge was wrong in allowing himself to be influenced by the conduct of the appellant in order to decide the truthfulness of the appellant and had thereby failed to give due consideration to the appellant's version of the accident. The trial judge should not have rejected the whole of the evidence of the appellant. He should have examined it in the context of the rest of the evidence to decide the parts that ought properly to be accepted and the parts that ought properly to be rejected.

The real issue in this case is, where did the accident occur? The appellant said it occurred on his side of the road near the broken centre white line when the motor cycle shot across the road. At first the respondent said it occurred when he was three to four feet on the main road after passing the stop sign, that is on the appellant's side of the road, but he later changed his story and said it occurred after he had crossed the broken centre white line implying that the appellant went to the wrong side of the road and collided into him.

We are of the view that the trial judge was wrong in his finding that the accident occurred after the respondent had crossed the broken centre white line and had straightened his motor cycle and that it was a head on collision.

The damage to the appellant's motor car and to the respondent's motor cycle was on the offside of the vehicles. The respondent suffered injuries to his right leg. After the accident the respondent's motor cycle landed on the opposite side of the road. The respondent, when he was at the stop sign, saw the lights of the appellant's car fifty-nine feet away. All these undisputed facts support and are consistent with the version of the accident given by the appellant and not the version given by the respondent and it is clear that it could not have been a head on collision. In fact the respondent's first version supports the appellant's version.

We have no doubt that the accident occurred in the way described by the appellant, that the respondent shot out of Tangmere Road. The respondent, on seeing the appellant's motor car about 60 feet away, should have waited at the stop sign and let the appellant's motor car pass before crossing the road. We are of the view that this accident was caused solely by the negligence of the respondent.

Accordingly, the appeal is allowed with costs here and below.

From the above judgment the respondent appealed to the Privy Council.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

Nigel Murray (*Mrs. A. Weiss* with him) for the appellant.

Graeme Hamilton Q.C. for the respondent.

Lord Russell of Killowen (delivering the judgment of the Board): This is an appeal from the Court of Appeal Singapore by the plaintiff in a road accident case. The trial judge, D'Cotta J. concluded that the defendant (present respondent) was wholly to blame for the accident, in which the plaintiff was gravely injured. The Court of Appeal reversed that conclusion, and held that the plaintiff (present appellant) was wholly to blame.

At about 11 p.m. on May 22, 1973 the defendant

was driving an Opel Commodore 2000 car, borrowed from his employer, from the City towards Changi Point where he lived. It is convenient to describe the City as to the North and Changi Point to the South to conform to the top and bottom of the police plan of the area. The defendant had been at a Chinese wedding party in the City, and was driving alone. The road was Upper Changi Road. It, perhaps curiously, had on the East side of the "centre" dotted line a lane width of about 13 feet, while the width of the lane on the West side was some 18 feet.

Coming into Upper Changi Road on its East side was Tangmere Road. It forked just before joining Upper Changi Road, the right fork going towards the City. That fork had a continuous white line dividing it into two lanes.

The plaintiff had finished his work and on a reasonably elderly motor cycle was going home. This journey, to which he was habituated, involved his taking the right fork of Tangmere Road with a view to crossing the East lane of Upper Changi Road into its West lane and turning North therein towards the City.

According to the plaintiff's evidence he stopped at the stop sign at the debouchment of Tangmere Road (a minor road), looked right, then left, then right. He saw the lights of a vehicle to his right, approaching him on Upper Changi Road. In his evidence he said that he reckoned them to be 120 yards away, and that they were somewhere about the Chartered Bank. He said they were "much beyond" the bus stop on the East side of Upper Changi Road which stop he marked on the police plan, if it was anywhere near to scale (which it may not have been), as about 135 feet from his halting point in Tangmere Road. The plaintiff said that he crossed the East lane of Upper Changi Road, and turned towards the City having crossed the "centre" dotted line by 3 or 4 feet (having moved up from first to second gear) when he observed a car coming at him, very near, overlapping the West lane of Upper Changi Road. He said he veered left to avoid being hit by the car, but was unsuccessful.

The defendant's car sustained considerable damage to its off front side, that wing and headlight assembly being broken, and the bumper bent. The damage to the motor cycle was as follows: front offside crash bar dented; cylinder oil tank broken; offside petrol tank dented; offside footrest bent. The damage, and the injuries to the plaintiff, were consistent with a glancing impact and the plaintiff's evidence of veering left too late to avoid collision, though neutral as to the point of impact.

The defendant (in summary) said that the plaintiff shot out of Tangmere Road into Upper Changi Road across his path; that he had no time to avoid the collision which happened about 8 feet into the East lane of Upper Changi Road. He denied that it was a glancing impact.

The motor cycle as a result of the impact was thrown (with the plaintiff) to the West side of Upper Changi Road. The defendant said that he pulled up beyond Tangmere Road, but that he heard a commotion from a group of people emerging from a cafe or canteen and drove on because he was frightened. To explain his fear he said they were crying "Assault, assault", but later said he had not heard those words but only a commotion. The next morning he told his employer that he had driven the car into a tree: the employer collected the car and took it to a repair shop. The defendant only reported the accident to the police when the police discovered the car in the repair shop in the course of inquiries into the accident, and the employer told him to report it. The report when made said nothing of the circumstances of the collision. The trial judge inferred, correctly in their Lordships' opinion, that if the police had not found the car and connected it with the accident the defendant would never have said a word about it — apart from his lie to his employer. The trial judge said that the defendant's conduct was "such that it can only be attributed to one who knows full well that the accident occurred as a result of his negligence". In their Lordships' opinion, while it was quite legitimate to have regard to this conduct as a part, and indeed an important part, of the circumstances involved in an enquiry into responsibility in law for the accident, the phrase selected by the judge was too absolute in form. But that is not to say that his finding on liability is thereby vitiated.

The trial judge thus expressed himself on the credibility of the defendant:

> "I did not believe the defendant at all. I watched him very closely when he was giving evidence and I also watched his demeanour and I was convinced that he was not a witness of truth. I rejected his evidence."

In a further passage (page 35, Record), which in fact contained some errors of measurement, the trial judge nevertheless plainly accepted as a fact established by the evidence that the impact occurred when the plaintiff was over the dotted line in Upper Changi Road and had turned right towards the City, as the plaintiff had said.

There are two matters in the plaintiff's evidence which in their Lordships' opinion led to error in the judgment of the Court of Appeal; and it must be remembered as a matter of great importance that the Court of Appeal had before it, so far as oral evidence was concerned, merely a note of it by the trial judge based upon evidence given through an interpreter. According to that note the plaintiff originally said, in explaining the point of impact, that he was 3 or 4 feet "into Upper Changi Road". His later evidence in chief and cross examination was clear that he was saying that he was 3 or 4 feet over the dotted line in Upper Changi Road on the West side when he tried by moving to his left to avoid the impact. This apparent discrepancy in his evidence is well explained when it is observed that he said that before emerging from Tangmere Road he was in the centre of the road; but when he drew his starting point on police plan "AB3" it was in the centre of the left lane of Tangmere Road, which has a solid white line down its middle. The Court of Appeal in reaching its conclusion relied much upon their assumption that the plaintiff had in this regard changed his story. Their Lordships do not consider that there is any justification for this view. The plaintiff's first reference to

his position on the main road is clearly to be taken as a reference to his position on his correct lane of the main road, and the trial judge in his judgment so took it.

There is another point on which the Court of Appeal relied. The plaintiff, challenged upon his estimate that when he first saw the lights of a vehicle they were 120 yards away, said that it was twice the width of the trial courtroom — which would make it about 60 feet. The Court of Appeal treated it as an "undisputed fact" that the plaintiff saw the defendant's lights that distance only away. But this was not so. The plaintiff, as the judge said, was not good at distances: but his other evidence, which their Lordships would consider more reliable, was that they were "much beyond" the East bus stop — by the Chartered Bank, which is far beyond the 60 feet.

It is perhaps desirable to quote that which seems to their Lordships the crucial part of the judgment of the Court of Appeal. This was as follows: —

"The real issue in this case is, where did the accident occur? The appellant said it occurred on his side of the road near the broken centre white line when the motor cycle shoot (sic) across the road. At first the respondent said it occurred when he was three to four feet on the main road after passing the stop sign, that is on the appellant's side of the road, but he later changed his story and said it occurred after he had crossed the broken centre white line implying that the appellant went to the wrong side of the road and collided into him.

We are of the view that the trial judge was wrong in his finding that the accident occurred after the respondent had crossed the broken centre white line and had straightened his motor cycle and that it was a head on collision.

The damage to the appellant's motor car and to the respondent's motor cycle was on the offside of the vehicles. The respondent suffered injuries to his right leg. After the accident the respondent's motor cycle landed on the opposite side of the road. The respondent, when he was at the stop sign, saw the lights of the appellant's car fifty-nine feet away. All these undisputed facts support and are consistent with the version of the accident given by the appellant and not the version given by the respondent and it is clear that it could not have been a head on collision. In fact the respondent's first version supports the appellant's version.

We have no doubt that the accident occurred in the way described by the appellant, that the respondent shot out of Tangmere Road. The respondent, on seeing the appellant's motor car about 60 feet away, should have waited at the stop sign and let the appellant's motor car pass before crossing the road. We are of the view that this accident was caused solely by the negligence of the respondent."

It will be observed from this quotation that the Court of Appeal relied for its (in their Lordships' view) erroneous conclusion upon (a) a view that the plaintiff had changed his story and (b) that the plaintiff had first seen the defendant's vehicle lights 59 feet away. These they treated as "undisputed facts". They were not.

There is one other point. The plaintiff drew on the police plan his approximate course across the East lane of Upper Changi Road to within the West lane and indicated with "XX" his estimate of the point of impact. The course drawn was a projection of the plaintiff's lane in Tangmere Road and consequently not quite at right angles to Upper Changi Road. The trial judge accepted that the distance from "XX" to the point where the motor cycle was found by the police — on top of the kerb on the West side of Upper Changi Road — about an hour and three quarters after the accident was 50 to 60 feet. It was argued that this supported the evidence of the defendant as to the point of impact, who had marked it in the East lane immediately opposite Tangmere Road and consequently considerably nearer the point where the motor cycle was discovered than the "XX" point. The trial judge did not consider that this driving back of the motor cycle some 50 to 60 feet threw doubt on the plaintiff's version, and their Lordships agree. It must be remembered that the damage to the motor cycle and car indicated very forceful impact with the leg guard and foot rest. No expert evidence was called to say that in this respect the plaintiff's point of impact was for this reason at all unlikely. It is not even certain that the machine came to rest where it was found much later by the police. And finally on this point their Lordships observe that the judgment of the Court of Appeal did not suggest that this point told against the plaintiff.

It is of course true to say that an appeal to a Court of Appeal is a rehearing of the case. But much authority goes to show that such a court is, and indeed should be, much fettered in practice in its ability to disagree with findings of a trial judge in matters of this kind, particularly when they are restricted to the judge's notes of the evidence given, and given through an interpreter, and particularly when the judge has formed the opinion from the manner in which one of the parties has given his evidence that he was lying. Their Lordships do not propose to spell out further or repeat what has been previously said on this matter, *inter alia* by this Board in *Chow Yee Wah* v. *Choo Ah Pat.*[2] The Court of Appeal in this case has certainly not in express terms reminded itself of the practical fetters upon its ability to disagree with the findings of the trial judge. In effect it has said that despite the conduct of the defendant after the accident, and despite the bad impression as to his veracity made on the judge in the witness box, the judge should have accepted his evidence, and rejected that of the plaintiff. And this conclusion was based upon an erroneous assumption of two so-called "undisputed facts" as is shown by the passage already quoted.

For the defendant it was argued that this was after all a case of an emergence from a minor into a major road. The defendant might have been faced with an emergency and veered to his right into the West lane to avoid collision. But this was quite contrary to the defendant's evidence, and is the purest supposition of possibility. Their Lordships agree with the Court of Appeal that the crucial question on liability was where in Upper Changi Road the collision took place: but they are of opinion that the Court of Appeal failed to appreciate the practical limitations upon its ability in the circumstances of the case to disagree radically with the conclusion of the trial judge, and based its disagreement upon unsound grounds. Accordingly the appeal is allowed, and the judgment of the trial judge restored, and the defendant must pay the costs of the plaintiff in the Court of Appeal and of the appeal to this Board.

Appeal allowed.

Solicitors: *James & Charles Dodd; Charles Russell & Co.*